Supreme Court, U.S.
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No. 98-30

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

LECHUZA VILLAS WEST,
a California limited partnership,
Petitioner,
v.

CALIFORNIA COASTAL COMMISSION, STATE OF CALIFORNIA, STATE LANDS COMMISSION, and MALIBU-ENCINAL HOME OWNERS ASSOCIATION, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

CALIFORNIA'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the appellate court properly determined that the administrative agency had not made a final use determination where, as a matter of state property law unchallenged in this petition, the project proposed by the landowner would have encroached on public tidelands and the agency has never reviewed a project that was confined solely to the landowner's property.

2. Whether a landowner waived its contention that the state court of appeal improperly dismissed its taking claim as unripe where (1) the landowner stipulated in writing that the quiet title claims should be adjudicated before its taking claim and (2) failed to raise its ripeness claim before the state's highest court.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The California Coastal Commission, the State Lands Commission and the State of California respectfully request that this Court deny the petition for a writ of certiorari seeking review of the California Court of Appeal's decision.

OPINIONS BELOW

In its listing of trial court rulings, the petition of Lechuza Villas West (Lechuza) omits a trial court order denying Lechuza's petition for a writ of administrative mandate

challenging the Coastal Commission's denial of the project as proposed. 2 Joint Appendix before the California Court of Appeal ("JA") 401410.

JURISDICTION

The Court does not have jurisdiction under 28 U.S.C. § 1257 because Lechuza did not present its question to the state's highest court.

STATEMENT OF THE CASE

A. Introduction

In October 1990 Lechuza purchased a narrow strip of undeveloped sandy beach that lay between the toe of a coastal bluff and the waters of the Pacific Ocean. At the time of the purchase Lechuza acknowledged in writing that the location of the mean high tide line "will have a material affect" on its ability to develop the property. For the past seven years Lechuza has been seeking to construct a 17-unit residential development project on this sandy beach. According to undisputed survey evidence, the proposed development would have encroached substantially seaward of the mean high tide line. In an effort to extend the seaward boundary of its property to accommodate its project, Lechuza argued before the Coastal Commission and the lower courts that the tidelands boundary should be permanently fixed at an "average" location of the mean high tide line.

Although one trial court judge accepted Lechuza's novel argument, the court of appeal reversed and reaffirmed longstanding California law that the tidelands boundary is the ambulatory mean high tide line. See, e.g., *Strand Improvement Co.* v. *City of Long Beach,* 173 Cal. 765, 161 P. 975, (1916). Accordingly, the court of appeal vacated the taking determination and dismissed the taking claim as unripe because the Coastal Commission could not make a final determination of use until Lechuza proposed a project that

confined its proposed residential structures to its own property and not the public's.

In this petition Lechuza does not challenge the court of appeal's resolution of California boundary law, nor does it challenge the stipulated evidence at the quiet title trial which showed that its project, if constructed as proposed, would have significantly encroached on public tidelands. Instead, Lechuza asks the Court to rule that its taking claim was ripe even though it did not own the land that it proposed to develop. Lechuza, however, did not seek review of any takings issues in the California Supreme Court. Further, it waived any objection that its taking claim was not tied to its ownership of the property when it stipulated in writing to try the quiet title claims before the taking claim. 5 JA 1177.

In any event, Lechuza's contention that the court of appeal's resolution of the taking issue conflicts with *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), is in error. Both *Williamson County* and the court of appeal decision require that the administrative agency make a final determination of use before a taking claim becomes ripe for review. In this case, as the court of appeal correctly concluded, the Coastal Commission could not make a final use determination until Lechuza submitted a development proposal that was sited on its property, not the public's. Ownership of the property sought to be developed is a necessary predicate to a taking determination, see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028-1036 (1992), and Lechuza never met this burden because the undisputed survey evidence demonstrated that the project proposed by Lechuza encroached onto sovereign tidelands below the mean high tide line.

Lechuza's petition for a writ of certiorari should be denied.

B. Facts

Lechuza Villas West acquired 17 contiguous lots on a sandy beach in Malibu below a coastal bluff. Exh. 5. None of the lots has road access. 12 JA 2565. There once was a road

immediately landward of the subject property, but that road was destroyed by storm waves in the 1930's and never replaced. *Ibid.*; 12 JA 3165. The subject property is adjacent to an existing developed private community on the bluff top. 12 JA 2911, 3165. Other than several houses on the far east end where the beach is wider, the beach lots in the community are largely undeveloped. *Ibid.*

Lechuza purchased the subject property "as is," acknowledging that it was aware of limitations on development of the property, including potential title claims of the State and easement claims of the Malibu-Encinal Home Owners Association (MEHOA). 12 JA 2993-2994. The purchase agreement signed by Lechuza acknowledged, among other development obstacles, that:

> "***Buyer's Representations.*** . . . the location of the mean high tide line will have a material effect on the existence, extent, configuration and development potential of Seller's Residential lots." (Emphasis added.) *Ibid.*

In October 1990 Lechuza applied for coastal development permits to construct a 1,200-foot long road, a continuous 985-foot long rock revetment across all 17 of the lots, and the first four of the 17 single-family residences that it eventually wished to build. 12 JA 3137. During the coastal permit process, Lechuza obtained letters from the State Lands Commission stating that the Lands Commission would not object to the project because the proposed residences appeared to be located landward of known surveyed mean high tide lines but that the Lands Commission had not made a final boundary determination and reserved the right to assert State claims in the future if it determined that State lands were involved. E.g., 12 JA 3119.

During January 1991 the Coastal Commission denied three nearly identical sets of permit applications. 10 JA 2462. The Coastal Commission found that the project was inconsistent with numerous resource policies of the Coastal Act, such as the impacts of the proposed seawall on coastal processes. 12

JA 3138-3154. The Commission's findings noted that the mean high tide line could be more landward than believed and that areas of public beach could be impaired by the proposed revetment. 12 JA 3150.

After the United States Supreme Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), the parties stipulated to a remand of the consolidated permit applications for reconsideration in light of *Lucas*. 10 JA 2562, 11 JA 2752. Another public hearing was conducted in January 1993, and the Commission denied the consolidated applications that are the subject of this case. 10 JA 2561. Relying on expert evidence, including the opinion of Lechuza's expert, the Coastal Commission found that the applicant failed to show that the proposed development would not encroach on publicly-owned tidelands that exist seaward of the mean high tide line. 10 JA 2570-2576. The Coastal Commission also found that the project would encroach within areas periodically covered by ocean waters, which areas were subject to public recreational rights, independent of property ownership. 10 JA 2572-2573. And, as with the earlier applications, it found that the project was inconsistent with numerous Coastal Act resource policies. 10 JA 2577-2611.

Lechuza filed a petition for a writ of mandate and a complaint alleging that the Commission's denial of the consolidated permit applications in January 1993 violated the Coastal Act and effected a taking of property. 1 JA 1. In the mandate phase of the litigation, Judge Robert O'Brien of the Los Angeles County Superior Court denied the applicant's petition for a writ of mandate. 2 JA 401, 410. He determined that substantial evidence supported the Coastal Commission's decision that the applicant failed to meet its burden of establishing ownership of the property that it wished to develop because the evidence at the administrative hearings demonstrated that the project would encroach seaward of the mean high tide line. 2 JA 407, 408. Judge O'Brien rejected Lechuza's legal theory that the boundary was an "average" mean high tide line that had a permanently fixed location. 2

JA 407-408. He acknowledged that the Coastal Commission's decision was not definitive on the issue of title, and suggested that Lechuza first seek to quiet its claimed title to the subject property before reapplying to the Coastal Commission. *Id.* Judge O'Brien withheld entry of judgment because of the one final judgment rule. 2 JA 410.

In 1995 Lechuza voluntarily amended its complaint to include quiet title claims against the State Lands Commission. 5 JA 1177. MEHOA joined this action to determine the location of a 25-foot wide express easement that allowed its members a right of use for access and recreation along the beach. 4 JA 807. The parties stipulated in writing that the quiet title issues would be adjudicated in the first phase of the litigation, and that the taking claim would not be adjudicated until after the completion of the quiet title phase. 5 JA 1177-1178.

Trial on the quiet title issues commenced in October 1995. The considerable survey evidence produced at the quiet title trial corroborated the Coastal Commission's finding that the mean high tide line was located from time to time within the area Lechuza wished to develop. Of the 33 mean high tide line surveys performed on the subject property since the Coastal Commission hearings in January 1993, 23 of the surveys (70%) showed the mean high tide line to be within the area Lechuza proposed for development. 12 JA 2921.

In contrast to Judge O'Brien, Judge Ernest Hiroshige (the quiet title and taking judge) rejected the Lands Commission's argument that the boundary was the ambulatory mean high tide line. Instead, Judge Hiroshige determined that the boundary was to be a permanently fixed average line in the location of a mathematical average of all 37 surveys that had been performed at the site prior to the close of trial. 8 JA

1920.[1]

Following the quiet title trial, the Coastal Commission moved for summary judgment and judgment on the pleadings on the ground that Lechuza's taking claims were not ripe for review. 9 JA 2069, 2071; 8 JA 1988. Lechuza in turn filed a motion for summary adjudication to establish the Coastal Commission's liability for a regulatory taking. 10 JA 2338. Although the Coastal Commission disputed 71 of Lechuza's 95 allegedly undisputed material facts, 13 JA 3432-3454, Judge Hiroshige granted Lechuza's motion for summary adjudication as to its claim that there had been a "temporary" regulatory taking. *Ibid.* Adopting the reasoning of Lechuza, 10 JA 2357, Judge Hiroshige found that the Commission, by erroneously concluding that the ambulatory mean high tide line was the boundary, had temporarily "taken" Lechuza's property. 17 JA 4342. He further determined that Lechuza's "permanent" taking claim was not ripe because Lechuza would have to redesign its project to avoid encroachment into MEHOA's express easement. 17 JA 4345.

On appeal, the California court of appeal vacated the orders against the state agencies and MEHOA. Rejecting Judge Hiroshige's permanently fixed average line, the court of appeal determined that the boundary between Lechuza's uplands and the public tidelands was the mean high tide line, a boundary that fluctuated in response to natural accretion and erosion. Pet.App., B-21 to B-33. The court rejected the Lands Commission's argument that the public had rights to use the navigable waters of the Pacific Ocean, even if those waters extended landward of the mean high tide line, concluding that navigable waters, as a matter of law,

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1. With regard to MEHOA's easement, Judge Hiroshige determined that MEHOA's express easement extended 25 feet landward from the "average" mean high tide line that he had established as the permanent tidelands boundary. 8 JA 1922. As a result, even under Judge Hiroshige's view of the law, Lechuza's proposed project encroached upon MEHOA's easement. 8 JA 1934.

terminated at the mean high tide line. *Id.* at B-34 to B-37. The court vacated the trial court's determination that the Coastal Commission had engaged in a taking, concluding that the Coastal Commission had not made a final determination of permissible use because Lechuza had not established that it had a right to develop "its" property, having never actually established the seaward boundary of its property and the landward limit of the homeowners's easement which encumbered the property. *Id.* at B-21.

Lechuza filed a petition for review with the California Supreme Court. The petition for review challenged the court of appeal's resolution of state law issues, *infra* at n. 2, but did not raise any issue relating to the court of appeal's disposition of the taking claim. The California Supreme Court denied review.

REASONS WHY THE PETITION SHOULD BE DENIED

I. LECHUZA WAIVED ITS RIPENESS ARGUMENT BY STIPULATING TO TRY THE QUIET TITLE CLAIMS BEFORE ITS TAKING CLAIM AND BY FAILING TO RAISE ITS RIPENESS ARGUMENT BEFORE THE CALIFORNIA SUPREME COURT

Lechuza apparently contends that the court of appeal improperly dismissed its taking claim as unripe because, in Lechuza's view, it should have been allowed to litigate its taking claim even though it did not own the property on which its project was located. Asking a court to adjudicate a taking claim in these circumstances makes no sense, particularly when Lechuza is now bound by the California courts' articulation of state boundary law. Even Lechuza concedes that the court of appeal's resolution of the taking issue does not present a genuine conflict with this Court's ripeness decisions. Lechuza Pet. at p. 25.

Apart from this, Lechuza waived its argument that its taking

claim was ripe regardless of whether it owned the property that is the subject of its taking claim. Following Judge O'Brien's denial of its petition for a writ of mandate challenging the Commission's decision, Lechuza voluntarily amended its complaint to add quiet title claims and then stipulated that the quiet title issue would be tried before the taking claim. 5 JA 1177. Having agreed that its quiet title claims would be tried first, Lechuza waived its current claim that a taking claim is ripe even though the claimant has not established ownership of the property sought to be developed.

Moreover, Lechuza failed to raise its objection to the court of appeal's disposition of the taking claim in its petition for review in the California Supreme Court. This precludes Lechuza from seeking this Court's review of the taking issue. *Adams* v. *Robertson*, 520 U.S. 83 (1997); *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985).[2]

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2. Lechuza's petition for review in the California Supreme Court presented only the following two issues:

> "[W]hether, in a quiet title action authorized by [California Public Resources Code] section 6357, the trial court is empowered actually to 'describe and define' the boundary line according to a methodologically sound formula, or is limited to declaring merely that the boundary is a constantly shifting line that moves from day to day."

and

> "[W]hether a remand pursuant to [California Code of Civil Procedure] section 1094.5(e) is precluded (1) where the relevant evidence was simply not in existence at the time of the hearing, or (2) where the need for such evidence became apparent only by an action of the agency long past the time when it was reasonably possible to obtain the evidence in advance of the scheduled hearing."

(Lechuza Petition for Review at pp. 1-2.)

II. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *WILLIAMSON COUNTY*.

A. The Application of California Boundary Law to Lechuza's Property.

Since the earliest days of western civilization and throughout the development of the civil and common law, the boundaries of waterbodies have been "ambulatory" lines that move in response to natural accretion and erosion. See, e.g., *County of St. Clair* v. *Lovingston*, 90 U.S. 46, 69 (1874). Implementing this rule of moving water boundaries, both this Court and the California courts uniformly have held that the boundary of tidelands in their natural condition is the "mean high tide line," a line that shifts with changes in the shore profile. See, e.g., *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935) (federal rule); *Strand Improvement Co.* v. *City of Long Beach,* 173 Cal. 765, 161 P. 975 (1916) (state rule).

Against this legal backdrop, Lechuza purchased 17 narrow sandy beach lots in Malibu for about $2 million (a highly speculative purchase because a single, developable beachfront lot in Malibu costs about $2 million). At the time of the purchase, Lechuza acknowledged in writing that "the location of the mean high tide line will have a material effect on the existence, extent, configuration and development potential of Seller's Residential lots." After the Coastal Commission rejected Lechuza's applications to construct up to 17 houses and a massive 985-foot long rock seawall because the project would encroach on public tidelands and that decision was upheld by the mandate judge, Lechuza proceeded with litigation to permanently fix an "average" boundary line that would allow its development to proceed without regard to the actual location of tidelands.

Following the rule in cases such as *Borax* and *Strand*, however, the court of appeal correctly rejected Lechuza's

average line theory and concluded that the boundary was located at the ambulatory mean high tide line. This determination necessarily invalidated the quiet title judge's conclusion that the Coastal Commission engaged in a regulatory taking, because the trial court's finding of taking liability was premised on its erroneous view that the tidelands boundary was a permanently fixed "average" mean high tide line, and that Lechuza owned the property that it wished to develop. *Supra* at 7. Accordingly, Lechuza's taking claim could not ripen before it applied for a coastal permit to develop a project that was confined to its own property and that did not encroach on state-owned tidelands. The courts below quite properly concluded that the Coastal Commission could not make a final determination of Lechuza's development plans until Lechuza submitted a development proposal that did not intrude onto someone else's property.

B. There Is No Conflict With *Williamson County*.

Lechuza contends, however, that the court of appeal's decision conflicts with *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), because, according to Lechuza, the court of appeal supplanted *Williamson County's* requirement that a claimant obtain a final administrative decision with a requirement that a claimant obtain a final judicial decision. See, e.g, Lechuza Pet. at 14. Lechuza misreads the court of appeal's decision. The court of appeal did not impose a final judicial decision requirement. The court of appeal found that the Coastal Commission itself could not issue a final administrative decision until Lechuza proposed a project on property that it owned. Otherwise, courts would be adjudicating taking claims on purely hypothetical projects that could never be built because they were not located on the applicant's property.

Moreover, even if one were to conclude that the court erred in dismissing the taking claim on ripeness grounds, Lechuza's taking claim would fail on the merits. A person alleging a

taking claim must own the property that it alleges to be taken. See *Lucas, supra,* 505 U.S. at pp. 1028-1036; see also *United States* v. *Dow*, 357 U.S. 17, 20 (1958) (taking claimant must establish ownership of the property at the time of the alleged taking). Even were this case to be remanded, Lechuza could never establish a taking claim. Lechuza would be bound by Judge O'Brien's determination—upheld by the court of appeal but ignored here by Lechuza—that Lechuza had the burden of establishing the ownership of the property that it proposed to develop. Lechuza could not meet that burden because its proposed project encroached on public tidelands below the mean high tide line.[3]

All of this explains why Lechuza's very articulation of its question presented is defective. Its assumption that the "owner has obtained a conclusive determination from the regulatory agency that no economically viable of the subject property will be allowed" begs the question. Lechuza did not and could not obtain a conclusive determination from the Coastal Commission because it has never established that it owned the "subject property" on which it proposed its

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3. Throughout its petition Lechuza repeatedly states that the court of appeal "did not disturb" or "did not reject" the trial court's findings on the taking issues. E.g., Lechuza Pet. at pp. 12, 13. The court of appeal vacated Judge Hiroshige's order establishing the Commission's liability for a taking. Because Judge Hiroshige's determination that the Coastal Commission had engaged in a regulatory taking was premised on Judge Hiroshige's erroneous belief that the boundary line under California law was a permanently, fixed average line, *supra* at 7, the court of appeal's boundary decision necessarily invalidated the rationale underlying the trial court's determination of taking liability. In any event, there is no basis to infer that the court of appeal acquiesced or agreed with those trial court rulings that it did not explicitly address in the opinion. Lechuza cites no authority to support the proposition that where a reviewing court is silent on an issue, it should be inferred that it resolved the issue in favor of the *losing* party.

development and which it now claims to have been taken.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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4. Lechuza's petition spends considerable space criticizing the California judiciary. See, e.g., Lechuza Pet. at pp. 21 (referring to California judiciary's supposed "hostility" to the Just Compensation clause and to its "assault" on this Court's precedent). No useful purpose would be served by further responding to these comments.